IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1814

HELEN CORLESS,

Appellant,

vs.

CITY OF LEBANON,

Appellee.

Appeal From The Supreme Court Of The State Of Ohio

JURISDICTIONAL STATEMENT

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No. _____

HELEN CORLESS,

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Appeal From The Supreme Court Of The State Of Ohio

OPINIONS BELOW

This is an appeal from the final judgment of the Supreme Court of the State of Ohio (Case No. 77-211), of April 29, 1977, dismissing Appellant's appeal, *sua sponte*, of the decision of December 27, 1976, of the Court of Appeals for the Second Appellate District of Ohio (Montgomery County) (Case No. 5328) which affirmed the decision of July 8, 1976, of the Court of Common Pleas of Montgomery County, Ohio (Case No. 75-804) granting summary judgment to the Appellee herein.

The Supreme Court of Ohio rendered no opinion. A copy of its order dismissing Appellant's appeal for the reason that no substantial constitutional question exists is printed in Appendix, p. 16a infra.

The opinion of the Court of Appeals for the Second Appellate District of Ohio, (Montgomery County), also

unreported, and the Judgment Entry affirming the Common Pleas Court decision is printed in Appendix, pp. 10-14 infra.

The decision of the Court of Common Pleas of Montgomery County, Ohio, also unreported, is printed in Appendix, pp. 1a-8a infra.

JURISDICTION

The Supreme Court of the State of Ohio, on April 29, 1977, issued a final order dismissing Appellant's appeal from a decision of the Court of Appeals for the Second Appellate District of Ohio, of December 27, 1976, affirming the judgment of the Montgomery County Court of Common Pleas of July 8, 1976, granting Summary Judgment to Appellee herein. The dismissal by the Supreme Court of Ohio was predicated on the ground that there was no substantial constitutional question presented by Appellant.

The Appellant filed her Notice of Appeal to the Supreme Court of the United States in both the Supreme Court of Ohio and in the Court of Appeals for the Second Appellate District of Ohio, on May 26, 1977.

The jurisdiction of the Supreme Court of the United States to review by direct appeal the foregoing judgment of the Supreme Court of Ohio, is conferred by 28 U.S.C. Section 1257 (2). (See e.g. *Horwitt* v. *Horwitt*, 90 F. Supp 528 (1950); *Winters* v. *People of State of N.Y.*, 68 S. Ct. 655, 333 U.S. 507. (1948)).

The Appellant herein challenges the constitutionality of a statute of the State of Ohio, namely, Section 701.02 of the OHIO REVISED CODE. This statute, verbatim, is as follows:

> "Any municipal corporation shall be liable in damages for injury or loss to persons or property and

> for death by wrongful acts caused by the negligence of of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent or servant is engaged upon the business of the municipal corporation."
>
> "The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:"
>
> > "(A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call;"
> >
> > "(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm."
>
> "Firemen shall not be personally liable for damages for injury or loss to person or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function."
>
> "Policemen shall not be personally liable for damages for injury or loss to person or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

QUESTIONS PRESENTED

Appellant respectfully requests the Supreme Court to assert jurisdiction of and hear this appeal on the grounds that it involves a substantial constitutional question and is of public or great general interest. The Ohio Supreme

Court, in denying Appellant's appeal, affirmed the lower Court's determinations that Appellant, having been injured in a collision with an ambulance owned by a municipal corporation and driven by a fireman employe of the municipal corporation cannot maintain an action against the municipal corporation under the statute, Section 701.02 OHIO REVISED CODE, which provides immunity to municipal corporations for negligence of its agents or employes.

The questions thus presented are:

1. Whether, in its application to Appellant, Section 701.02 of the OHIO REVISED CODE, which provides immunity to municipal corporations for negligence of its fire department employees operating motor vehicles owned by the municipal corporation causing injury to Appellant while such fire department employe is "answering any other emergency alarm" is unconstitutional as denying equal protection and due process, closing courts and denying remedy by due course of law to some but not all persons of the state.

2. Whether a municipal corporation is engaged in a governmental function under OHIO REVISED CODE 701.02 when an employee fireman is operating an ambulance in the course of his employment for the municipal corporation and transporting a person for a fee to a hospital outside the municipal corporaton.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States CONSTITUTION involved in this appeal is Amendment XIV to the CONSTITUTION, to-wit:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On or about October 7, 1973, the Appellant was a passenger in an automobile traveling East on Stewart Street, a duly dedicated thoroughfare in the City of Dayton, Ohio. The Appellee's ambulance, driven by Robert L. Puckett, a fireman in the Appellee's city, in the course of his employment, was traveling North of Main Street at approximately fifty (50 mph) miles per hour and entered the intersection of Main and Stewart Streets on the red light displayed to northbound traffic on a traffic control device at said intersection. Said ambulance was enroute to Miami Valley Hospital from Lebanon, Ohio, and contained a person who paid Twenty ($20.00) Dollars to the Appellee for the service it was performing. Appellee's ambulance struck the automobile in which the Appellant was riding, which ambulance had entered the intersection on the green light for East-bound Stewart Street traffic, resulting in injuries to Appellant.

By decision rendered July 8, 1976, the Montgomery County Court of Common Pleas granted summary judgment to Appellee on the basis that Appellee was immune from liability under OHIO REVISED CODE 701.02, and denied Appellant's motion to declare OHIO REVISED CODE 701.02 unconstitutional. The Court of Appeals for the Second Appellate District (Montgomery County) on De-

cember 27, 1976, affirmed the decision of the Montgomery County Common Pleas Court. On April 29, 1977, the Supreme Court of Ohio dismissed Appellant's appeal to that Court for the reasons that no substantial constitutional question existed.

FEDERAL QUESTIONS INVOLVED

The fundamental question involved here under the XIV Amendment to the CONSTITUTION is the right of persons to seek redress in the courts for injury sustained by an employee of a municipal corporation where that municipal corporation has, under State law, alleged herein to be unconstitutional, immunity from suit for those injuries. The assertion by the Appellant that the statute herein involved, namely, 701.02 OHIO REVISED CODE is unconstitutional, was raised by Appellant at the earliest instance before the Montgomery County, Ohio Court of Common Pleas, (see Appendix 2a); Appellant's motion was overruled by the Common Pleas Court in an Order dated January 30, 1976, and affirmed by the Court of Appeals for the Second District of Ohio on December 27, 1976, (see Appendix 10a).

The statute herein involved, namely Section 701.02 OHIO REVISED CODE, asserted herein to be unconstitutional has, at its root, the traditional governmental immunity doctrine which for years has been a part of the law of Ohio and of her sister jurisdictions. This doctrine, however, has been under attack for many years and has been abrogated or abolished outright in many jurisdictions. The Supreme Court of Pennsylvania said it best in *Ayala* v. *Philadelphia Board of Education*, 305 A.2d, 877 (1973) as follows:

> "We now hold that the doctrine of governmental immunity – long since devoid of any valid justification –

is abolished in this Commonwealth. In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine. See, e. g. Spencer v. General Hospital of District of Columbia, 138 U.S. App. D.C. 48, 425 F. 2d 479 (1969); Campbell v. State, 284 N.E. 2d 733 (Ind. 1972) (citing with approval Klepinger v. Board of Commissioners, 143 Ind. App. 155, 239 N.E. 2d 160 (1968) and Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E. 2d 169 (1967)); Evans v. Board of County Commissioners, 174 Colo. 97, 482, P. 2d 968 (1971); Flournoy v. School District No. 1, 174 Colo. 110, 482 P. 2d 966 (1971); Smith v. State, 93 Idaho 795, 473 P. 2d 937 (1970); Willis v. Department of Conservation and Econ. Dev., 55 N.J. 534, 264 A. 2d 34 (1970); Becker v. Beaudoin, 106 R.I. 562, 261 A. 2d 896 (1970); Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N.W. 2d 286 (1969); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Parish v. Pitts, 244 Ark. 1239, 429 S.W. 2d 45 (1968); Veach v. City of Phoenix, 102 Ariz. 195, 427 P. 2d 335 (1967) (relying on Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P. 2d 107 (1963)); Honey v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Sherbutte v. Marine City, 374 Mich. 48, 130 N.W. 2d 920 (1964); Rice v. Clark County, 79 Nev. 253, 382 P. 2d 605 (1963); Scheele v. City of Anchorage, 385 P. 2d 582 (Alaska 1963); City of Fairbanks v. Schaible, 375 P. 2d 201 (Alaska 1962); Spanel v. Mounds View School District No. 621, 264 Minn. 279, 118 N.W. 2d 795 (1962); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962); Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961); Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d (1961); Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N. E. 2d 89 (1959); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957)."

In so holding, the Pennsylvania Court stated "Today we conclude that no reasons whatsoever exists for continuing to adhere to the doctrine of governmental immunity . . . it is clear that no public policy considerations presently justify its retention."

Since *Ayala,* those jurisdictions cited therein, and others, have either added themselves to the growing list of jurisdictions abrogating or abolishing the doctrine, or have reaffirmed their position so abrogating or abolishing the doctrine, especially, as regards toward liability to political subdivisions within a state, (see for example, *Wade* v. *District of Columbia,* (D.C.) 310 A. 2d 857, (1973); *Merrill* v. *City of Manchester,* (N.H.) 332 A. 2d (1974); *Nieting* v. *Blondell,* (Minn.) 235 N.W. 2d 597 (1975); *Kitto* v. *Minot Park District,* (N.D.) 224 N.W. 2d 795 (1974); *Brown* v. *Wichita State University,* (Kan.) 547 P. 2d 1015 (1976); *Hicks* v. *State,* (N.M.) 544 P. 2d 1153 (1975); *Long* v. *City of Wierton,* (W. Va.) 214 S.E. 2d 832 (1975); *O'Dell* v. *School District of Independence,* (Mo.) 521 S.W. 2d 403 (1975).

The Statute provides that certain agents of a municipality are exempt from liability and the municipality is also thereby exempt from liability for negligence in the performance of certain governmental functions. Specifically, the exemption of liability of firemen in "answering any other emergency alarm" is so uncertain as to fail to meet constitutional muster for overbreadth and uncertainty in application. It is well settled that statutes may be inoperative and void for uncertainty in meaning in violation of the Fifth and Fourteenth Amendments to the United States CONSTITUTION.

It is equally well settled that a statute may be unconstitutional in its application to a specific class of individuals

where such statute violates an individual's fundamental rights to equal protection under the law and to seek redress in courts for injuries; otherwise, an appropriate compelling governmental interest must be shown to support such classification (see e.g. *Shapiro* v. *Thompson,* 394, U.S. 618; *Johnson* v. *Robinson,* 415 U.S. 361; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164).

Appellant herein asserts that that portion of OHIO REVISED CODE 701.02 which exempts a municipal corporation from liability is so vague and uncertain and so broad in its application as to defy interpretation, and that it has denied to the Appellant suitable redress in Court for injuries sustained and is, therefore, unconstitutional.

CONCLUSION

This Appeal raises an issue of fundamental importance, is a substantial constitutional question, and is of great public or general interest, involving an individual's rights to seek redress in courts under the XIV Amendment to the United States CONSTITUTION. In view of the substantial numbers of jurisdicions which have either abrogated or outright abolished the doctrine of immunity as it applies to municipal corporations, the issue raised in this appeal should be considered by the Court at this time.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

HELEN CORLESS,

Appellant,

vs.

CITY OF LEBANON,

Appellee.

Appeal From The Supreme Court Of The State Of Ohio

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX TO
JURISDICTIONAL STATEMENT

IN THE COMMON PLEAS COURT
OF
MONTGOMERY, COUNTY, OHIO

Case No. 75-804

HELEN CORLESS,

Plaintiff,

vs.

CITY OF LEBANON,

Defendant.

DECISION, ORDER AND
FINAL SUMMARY JUDGMENT

(July 8, 1976)

LOVE, J.

This cause is before the Court on a renewed motion for summary judgment filed by defendant, City of Lebanon. In a Decision and Order filed January 30, 1976, the Court overruled defendant's previous motion for summary judgment.

This Complaint arises out of a collision between an automobile in which plaintiff, Helen Corless, was riding, and defendant's ambulance, driven by a City of Lebanon fire-

man enroute to Miami Valley Hospital from Lebanon. Plaintiff alleges that defendant's ambulance, traveling at approximately fifty (50) miles per hour, proceeded through a red light into the intersection of Main and Stewart Streets in the City of Dayton. Defendant denied that the ambulance was traveling at the alleged speed or that it entered the intersection on a red light. Plaintiff seeks damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

Defendant's renewed motion for summary judgment, like its first one, is based on Section 701.02, Revised Code of Ohio. In pertinent part, that Section provides:

> "Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state . . . but only when such officer, agent, or servant is engaged upon the business of the corporation.
>
> "The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of: . . .
>
> > "(E) Members of a fire department while engaged in duty at a fire, or while proceeding toward a place where fire is in progress or is believed to be in progress, *or in answering any other emergency alarm.*" (emphasis added).

Section 701.02 appears to statutorily define "governmental function" as including the actions of city fire departments in putting out fires, pursuing fires and "answering any other emergency alarm". One way to formulate the problem is to ask the question, did the defendant's operation of its ambulance from Lebanon to Miami Valley

Hospital fall within the category of "answering any other emergency alarm"? One commentator has phrased the question in terms of whether a municipal corporation's fire department is engaged in a governmental function in answering a call for ambulance service. See, Comment, 3 Akron L. Rev. 188 (1970). Yet, this formulation of the question ignores the fact that Section 701.02, Revised Code of Ohio, seems to make "answering any other emergency alarm" a governmental function enjoying the same immunity as extinguishing a fire. That is, if a fire department of a municipality is negligent, but negligence is found to occur while "answering any other emergency alarm", the municipality is entitled to judgment in its favor.

Doubtless a good case could be made out, as it is in the Comment, that ambulance service is not an obligatory duty of a municipality and hence would, under the traditional tests, be considered only proprietary in nature. See Wooster v. Arbenz, 116 Ohio State 281, 284-85 (1927). Certainly, if the Supreme Court of Ohio has declared that the operation of a hospital is not a governmental function, then, in the absence of Section 701.02, Revised Code of Ohio, "other emergency alarm" language, there would be little support for the argument that operating an ambulance service is governmental. See, Sears v. Cincinnati, 31 Ohio State (2d) 157, 160-61 (1972); Op. of Atty. Gen. 67-078 (in which the Attorney General described ambulance service provided by fire departments in terms indicating its proprietary nature). However, as the student author of the Comment realizes, the traditional tests for governmental function have been preempted, to the extent of its coverage, by Section 701.02, Revised Code of Ohio. 3 Akron L. Rev. at 190-91. Interpreting the language of that Section to allow a municipality immunity from negligent actions of its fire department where the department

was "answering any other emergency alarm", this discussion reverts back to the question originally posed: did operation of the ambulance by defendant's fire department from Lebanon to Miami Valley Hospital in this case constitute "answering any other emergency alarm"? A collateral inquiry must be, can this question be decided as a matter of law, or is it a factual dilemma to be resolved by the trier of fact after presentation of evidence?

Other jurisdictions have held that similar issues are matters to be handled by a jury. See, 16 Cleveland-Marshall Law Rev. 442, 444 (1967); City of Des Moines v. Huff, 232 N.W. (2d) 574, 578-79 (1975). Recent Ohio cases have held that determination of whether a police vehicle was "responding to an emergency call" was a matter of law for the Judge. Lingo v. Hoekstra, 176 Ohio State 417 (1964); Spencer v. Heise, 107 Ohio App. 505 (1958). The consensus seems to be that the determination of "emergency call" status will be made as a matter of law where reasonable minds could not differ on the emergency nature of the situation.

The language, "answering any other emergency alarm" has never been precisely construed in Ohio. In Staudenheimer v. City of Newark, 62 Ohio App. 255, 257, the Court of Appeals for Licking County stated the defendant's contention, which equated "emergency alarm" with "an unforeseen combination of circumstances which call for immediate action", but did not indicate whether or not that contention was adopted. The phrase, "responding to an emergency call", according to the Ohio Supreme Court, "refers not just to a call in person or by a medium of communication from a citizen, superior officer . . . or . . . dispatcher, but rather to a 'call to duty'." Lingo v. Hoekstra, supra., at 421. The Court in Lingo also spoke of an "emergency call" as one arising from a dangerous situation.

Webster defines "alarm" and "call" in very similar terms.[1] It seems clear from the language of the Statute that "any other emergency alarm" does not refer only to fire alarms, as that more limited term would doubtless have been used. Moreover, as the Ninth Circuit stated in Puget Sound Electric Ry. v. Benson, 253 F. 710 (9th Cir. 1918), "all alarms of fire are emergency calls", so that interpreting "emergency alarms" as limited to fire alarms introduces a redundancy into the Statute. The better interpretation of the phrase "any other emergency alarm" would seem to encompass all emergency duties which are incident to the operation of the fire department. Here, ambulance service was especially made part of the official duties of defendant's fire department under the codified ordinances of the City of Lebanon, Section 121.03 and 927.01. See also, Lakoduk v. Chuger, 48 Wash. (2d) 642, 655 (1956), which held even in the absence of a municipal ordinance, that "because of the available equipment of the fire department and the special training of the firemen in the performance of first-aid duties, (ambulance service) was reasonably incident and appropriate to, and a part of, the duties of a fire department". However, although ambulance service is to be provided by the defendant's fire department, Section 927.01 of its ordinance states:

> "Such service is not intended to be a routine ambulance service but shall supplement private "services in *emergencies such as accidents involving physical injury, sudden illness of a serious nature and other similar emergencies.*" (emphasis added).

The ordinance suggests that defendant's fire department

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[1] Alarm: "A sound or signal giving notice of danger or calling attention to some event or condition".
Call: "A signal summoning firemen and apparatus into action . . . also: the response of men and equipment to such a call".

provides ambulance service only in emergency situations, and in doing so corresponds with the grant of immunity under Section 701.02, Revised Code of Ohio, which extends only to emergency situations. Although the preceding analysis compels the conclusion that emergency ambulance service falls within the coverage of Section 701.02, Revised Code of Ohio, the question of whether this particular case involved an "emergency" must be settled. As stated in Rankin v. Sander, 96 Ohio App. 40, 42 (1953), ". . . the defense of governmental function available to municipalities as to acks of members of the fire department is limited to instances of emergencies. . .".

The general rule is that whether a vehicle is driven in response to an emergency summons depends not on whether there is an emergency in fact but upon the nature of the call received and the situation as presented to the mind of the driver. City of Macon v. Smith, 160 S.E. (2d) 622, 627, 117 Ga. App. 363 (1968); Gurganas v. W. K. Huntemann & Son Funeral Home, 252 A. (2d) 911, 912 (D.C. App. 1969); City of Des Moines v. Huff, supra., at 578-79. As indicated previously, this question is reserved for the trier of fact, unless reasonable minds could not differ as to the existence of an emergency situation. In the case at bar, no evidence has been presented to the Court as to the nature of the call, or the situation presented to the mind of the driver. However, defendant's memorandum in support of its original motion for summary judgment stated that at the time of collision, the ambulance was being operated by a city fireman "while on an emergency run". In a sworn affidavit attached to its renewed motion for summary judgment, defendant's City Manager averred that the ambulance service provided at the time alleged in the Complaint "was established and maintained pursuant to the codified ordinances of the City of Lebanon". As previously

noted, Section 927.01 of those ordinances provides for ambulance service by the fire department only in emergencies. Plaintiff's supplemental memorandum in opposition to the motion for summary judgment contends that it must still be determined whether the run was made in accordance with the ordinance, and did involve an emergency. However, in her original Complaint, plaintiff alleged that the ambulance was on an emergency run at the time of the collision. This statement in the original pleading constitutes an admission against plaintiff's interest and could be introduced into evidence at trial by the defendant. The admission is not dispositive of the issue, but can be taken into account by the fact finder in reaching its determination. See, Pennsylvania Ry. Co. v. City of Girard, 210 F. (2d) 437, 440 (6th Cir. 1954); Borel v. U.S. Casualty Co., 233 F. (2d) 385 (5th Cir. 1956); Shell v. Parrish, 448 F. (2d) 528 (6th Cir. 1971). Considering all the evidence presented to the Court on this motion, it seems clear that there is no genuine dispute as to the emergency nature of the vehicle's operation in this case, and, therefore, reasonable minds could not differ on the question of whether defendant's fire department was "answering any other emergency alarm" at the time of the collision. Since defendant's fire department was engaged in answering an emergency alarm when the alleged negligence occurred, defendant is entitled to immunity on the basis afforded by Section 701.02, Revised Code of Ohio, i.e., that its fire department was engaged in a governmental function. Civil Rule 56 (C) provides that summary judgment is to be rendered if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is deemed well-taken and is hereby sustained.

This Decision, Order and Final Summary Judgment, was served upon all counsel, as indicated below, by ordinary mail, this 8th day of July, 1976.

/s/ RODNEY M. LOVE
RODNEY M. LOVE, JUDGE

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IN THE COMMON PLEAS COURT
OF
MONTGOMERY COUNTY, OHIO

Case No. 75-804

HELEN CORLESS,

Plaintiff,

v.

CITY OF LEBANON,

Defendant.

NOTICE OF APPEAL

(Filed August 3, 1976)

NOW COMES THE PLAINTIFF, and hereby gives Notice of her appeal to the Court of Appeals from a Decision, and Order granting final summary judgment, rendered by the Court, on July 8, 1976.

/s/ RAYMOND A. WHITE
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IN THE COURT OF APPEALS
OF
MONTGOMERY COUNTY, OHIO

Case No. CA 5328

HELEN CORLESS,
Plaintiff-Appellant

v.

CITY OF LEBANON,
Defendant-Appellee.

OPINION

Rendered on the 27th day of December, 1976

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SHERER, J.

This appeal is from a summary judgment in favor of the City of Lebanon in a negligence action. The action was

brought by a passenger in an automobile being operated in the City of Dayton. The Amended Complaint, paragraph three, alleges that plaintiff was injured when the automobile in which she was riding was traveling through a green traffic light and was struck by an ambulance being operated by an employee of the City of Lebanon who drove the ambulance at a speed of 50 M.P.H. through a red traffic light. The answer of the City of Lebanon denies the facts alleged in the Amended Complaint to the effect that its driver operated the ambulance at a speed of 50 M.P.H. through a red traffic light but admits all other allegations of said paragraph 3.

The City of Lebanon moved for summary judgment upon the grounds that there is no genuine issue of material fact, that the City at the time of the accident was engaged in the performance of a governmental function pursuant to Section 701.02, Revised Code, and is entitled to judgment as a matter of law.

Section 701.02, relating to liability of municipal corporations for operating motor vehicles (GC 3714-1) provides:

> "Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.
>
> "The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:

"(A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call.

"(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm."

The City's motion for summary judgment is supported by the affidavit of its City Manager. Appellant filed no responses thereto.

Section 121.03 provides:

"The Division of Fire shall consist of an organized group of volunteer firemen and rescue men, and shall provide the following services to the City:

"(a) Be responsible for the prevention of fire and for the control and extinguishment within the City and within other areas in accordance with any agreements which the City may now have or may enter into, and for the protection of lives and property endangered by fire.

"(b) Be responsible for the operation of the Life Squad equipment and provide the services normally associated with Life Squad work."

As amended by Ordinance 1491, Sec. 927.01, relating to service to be provided, provides:

"927.01 (a): Life Squad service shall be furnished by the Division of Fire as provided for in the Administrative Code. Such service is not intended to be a routine ambulance service but shall supplement private services in emergencies such as accidents involving physical injury, sudden illness of a serious nature and other similar emergencies.

"927.02, relating to fees and collection:

"(a) For Life Squad service rendered entirely within the corporate limits of Lebanon there shall be no charge;

"(b) For Life Squad service which originates inside the corporate limits but which ultimately involves a trip outside the corporation such as to a hospital, a charge of $20.00 per run shall be made;

"(c) Money collected for Life Squad service shall be deposited to the credit of the General Fund;"

Section 737.11 of the *Revised Code* provides:

"The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority thereof, and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire. Both the police and fire departments *shall perform* such other duties as are provided by ordinance." Emphasis supplied.

The Trial Court rendered summary judgment in favor of the City of Lebanon upon its conclusion that at the time of the accident the City was in the performance of a governmental function.

Appellant disagrees, assigning two errors:

(1) The Trial Court erred in granting the summary judgment.

(2) The Trial Court erred in granting summary judgment to defendant refusing to declare Ohio Revised Code 701.02 unconstitutional.

Appellant argues that the service rendered by the City of Lebanon was rendered in the performance of a proprietary function for a fee charged a private person.

A proprietary function was defined, as follows, by Chief Justice Marshall in *City of Wooster* v. *Arbenz* (1927), 116 Ohio St. 281, 284:

> "If . . . . there is no obligation on the part of the municipality to perform . . . (a given function) and the city has an election whether to do or omit to do those acts, the function is private and proprietary."

Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, abolished the defense of governmental immunity and empowered the general assembly to decide in what courts and in what manner suits may be brought against the state. *Krause* v. *The State of Ohio,* 31 Ohio St. 2d 132, 285 N.E. 2d 736. Municipal corporations, being an arm of the state government, are subject to these provisions.

By enacting Section 701.02, Revised Code, the Legislature has extended the defense of sovereign immunity to municipal fire departments while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or *in answering any other emergency alarm.* Such section is not unconstitutional as claimed by appellant. See *McDermott* v. *Irwin,* 148 Ohio St. 67.

We see no error in the action of the Common Pleas Court in rendering summary judgment in favor of the City of Lebanon.

The judgment will be affirmed.

KERNS, P. J., and McBRIDE, J., concur.

IN THE COURT OF APPEALS
OF
MONTGOMERY COUNTY, OHIO

Case No. CA 5328

HELEN CORLESS,
Plaintiff-Appellant

v.

CITY OF LEBANON,
Defendant-Appellee.

NOTICE OF APPEAL
(Filed January 25, 1976)

Notice is hereby given that HELEN CORLESS, Plaintiff-Appellant herein, hereby appeals to the Supreme Court of Ohio from the Judgment entered in this action by the Court of Appeals for the Ohio Second Appellate District, entered on the 28th day of December, 1976.

This case involves a substantial constitutional question under Article I, Sections II and XVI of the CONSTITUTION of the State of Ohio, and under Amendment XIV of the CONSTITUTION of the United States.

/s/ RAYMOND A. WHITE
RAYMOND A. WHITE
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Suite 310 Mumma Bldg.
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Dayton, Ohio 45402
224-1193

IN THE SUPREME COURT OF OHIO

Case No. 77-211

HELEN CORLESS,
Plaintiff-Appellant

v.

CITY OF LEBANON,
Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR MONTGOMERY COUNTY

This cause, here on appeal as of right from the Court of Appeals for Montgomery County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness may hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

IN THE COURT OF APPEALS
OF
MONTGOMERY COUNTY, OHIO

Case No. CA 5328
77-211 Supreme Ct. of Ohio

HELEN CORLESS,
Plaintiff-Appellant

v.

CITY OF LEBANON,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed May 26, 1977)

Notice is hereby given that HELEN CORLESS, the Appellant herein above named, hereby appeals to the Supreme Court of the United States from the final Judgment of the Supreme Court of the State of Ohio, of April 29, 1977, dismissing Appellant's appeal, sua sponte, of the decision of December 28, 1976, of the Court of Appeals for the Second Appellate District of Ohio (Montgomery County), which affirmed the decision of the Court of Com-

mon Pleas of Montgomery County, Ohio, granting summary judgment to the Appellee herein. This appeal is taken pursuant to 28 U.S.C., 1257 (2).

Respectfully Submitted:

/s/ RAYMOND A. WHITE
RAYMOND A. WHITE

Attorney for Plaintiff-Appellant

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